



DATE: June 2, 2011

RE: Enforceability of Physician Noncompete Clausesⁱ

Does 10 miles make a difference in a noncompete clause? A court in Lee County, Florida, is about to answer this question. Dr. Eric Eskioglu alleges that the 2006 noncompete clause in his employment contract with Lee Memorial Health System is unenforceable. The contract restricts Dr. Eskioglu from practicing neurosurgery within 50-miles of Lee Memorial Hospital. Dr. Eskioglu has resigned from Lee Memorial Health System and has started performing neurosurgery at Physicians Regional Medical Center in Collier County, 40 miles away. The impending question is whether the court should enjoin him from continuing to perform surgeries at Physicians Regional. Unique to his case is the fact that Dr. Eskioglu's practice involves a new type of minimally invasive neurosurgery that only approximately 60 physicians in the country are trained to perform. Thus, the jury will have to decide if Dr. Eskioglu's unique skills benefit the community enough to modify the terms of his employment contract. See *Eskiloglu v. Lee Memorial Health System*, 11-CA-000617)(12th Judicial Circuit, J. McHugh).

While this case is interesting for its public policy precedent, the more pressing question for most employers and physicians are: what are your rights as an employer who has a noncompete clause with an employed physician; *or* as an employed physician what are your legal obligations under a noncompete clause and what defenses might be available to you?

Since noncompete clauses are generally governed by the law in effect as of the year they were entered, a short overview of the history and evolution of noncompete clauses is informative to these questions. Florida has a somewhat tortured history when it comes to interpreting and enforcing post-termination restrictive covenants (frequently termed noncompete clauses) in employment contracts as discussed herein.

Prior to 1953, Florida courts heavily disfavored noncompete agreements. See John A. Grant, Jr. & Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original "Unfair Competition" Approach for the 21st Century*, 70 FLA. B.J. 53 (1996)("Grant & Steele"); John Sanchez, *A Survey Of Physician Non-Compete Agreements In Employment Under Florida Law*, Nova Law Review (Fall 2010)("Sanchez"); see, e.g., *Love v. Miami Laundry Co.*, 160 So. 32, 34 (Fla. 1935)(holding: "courts are reluctant to uphold contracts whereby an individual restricts his right to earn a living at his chosen calling").

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In 1953, the Florida Legislature enacted Section 542.12, Florida Statutes. The original purpose for this statute was to protect the legitimate business interests of employers. Ergo, it was intended to alter the judicial disfavor of noncompete clauses and enhance their enforceability. *Id.*; see, e.g., *Capelouto v. Orkin Exterminating Co. of Fla.*, 183 So. 2d 532, 534 (Fla. 1966)(holding the goal of section 542.12 was to “protect the legitimate interests of the employer”); see also *Miller Mech., Inc. v. Ruth*, 300 So. 2d 11, 12 (Fla. 1974)(holding: “[t]he statute is designed to allow employers to prevent their employees and agents from learning their trade secrets, befriending their customers and then moving into competition with them.”).

However, through the 1970s and 1980s Florida courts veered away from the original intent of the legislation and instead sunk into the murky abyss of contract case law. Thus, decisions were inconsistent, fact oriented and extremely unpredictable. The thread of consistency that emerged through the case law was a judicially created presumption of irreparable harm where a breach of the noncompete clause was shown. This allowed the entire body of noncompete clause judicial interpretation to be focused on whether the noncompete clause was reasonable. That question in turn typically centered around the geographic scope and term of the limitation. See *King v. Jessup*, 698 So. 2d 339 (Fla. 5th Dist. Ct. App. 1997)(acknowledging the judicial creation of presumption of irreparable harm); see also *infra* (Grant & Steele; Sanchez).

In 1990, there was a significant amendment to Section 542.33, enacted by the Florida Legislature which eliminated the judicially created presumption of irreparable harm and instead forced the employer to prove that the breach of the noncompete clause actually caused the employer irreparable harm. Obviously, this made it much more difficult for employers to enforce noncompete clauses. In 1996, however, the Florida Legislature adopted Section 542.335, which among other changes shifted the burden of proof of irreparable harm from the employer having to prove there was irreparable harm to the employee having to prove there was not irreparable harm. See *Infra* Grant & Steele; Sanchez. Thus, depending on when the noncompete clause was entered into there could be vastly different results as to its enforceability.

Regardless of when a noncompete clause was entered, there are numerous defenses that both employers and employees should understand. The first issue to consider is the duration of the restrictive covenant. Section 542.335, Florida Statutes, creates specific “rebuttable presumptions” for restrictions against former employees and those that are 6 months or less are presumed reasonable and enforceable, while those over 2 years are presumed not reasonable and not enforceable. The substantial grey area in between 6 months and 2 years must be weighed and evaluated based on all of the facts and circumstances.

As to geographic scope, the statute does not create a specific range of reasonable scope, but generally speaking the larger the scope, the less likely of its enforceability. On the other hand, the more specialized area that the physician practices, the greater geographic area that might be determined to be reasonable. An important consideration in this determination are the available alternatives for patients within the particular geographic area to access the same physician services. Thus, in the *Eskioglu* case, the fact that Dr. Eskioglu has a specialized medical practice will weigh in favor of allowing a broad geographic range to be acceptable for

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his noncompete clause; however, the fact that there are so few neurologists that have his skill set and the potential harm to patients that have to travel to receive those services will weigh in favor of finding the noncompete clause unenforceable as a matter of public policy.

One of the most common defenses to the enforceability of a noncompete clause is that the employer breached the underlying employment contract (a prior breach of a dependant covenant) and therefore the employee's obligations under the noncompete are not enforceable because of the employer's breach. On a related concept, an employee may also claim the employer has "unclean hands" and therefore the noncompete clause is unenforceable. For example, if an employer was asking the employed physician to do something unethical or illegal, it could be argued the employer does not have "clean hands" to enforce the noncompete clause. Another common defense to a noncompete clause is that the employer failed to enforce a similar noncompete clause against other employees and has waived the right to enforce it now. *See* N. James Turner, *Successfully Defending Employees in Noncompete and Trade Secret Litigation*, 78 FLA. B.J. 43, 44-46 (2004); *see, e.g., Cordis Corp. v. Prooslin*, 482 So. 2d 486 (Fla. 3d DCA 1986)(denied temporary injunction where employer breached underlying contract); *Benemerito & Flores, M.D.s, P.A. v. Roche*, 751 So. 2d 91 (4th DCA 1999)(noncompete clause unenforceable where employer breached the employment contract by failing to fully compensate her for services provided); *Troup v. Heacock*, 367 So. 2d 691 (Fla. 1st DCA 1979)(same); *Bradley v. Health Coalition, Inc.*, 687 So. 2d 329 (3d DCA 1997)(same); *Bradley v. Health Coalition*, 687 So. 2d 329 (3d DCA 1997)(holding employer had "unclean hands" and could not enforce noncompete agreement where employer had attempted to make employee resell certain plasma products that had been returned by a customer and employee believed product had been rendered unsafe for medical use).

There are also of course other basic contract defenses such as lack of consideration or statute of frauds problems. For example, where the written contract has ended per its terms but an oral extension of the employment contract is entered into and both parties continued to work under similar terms without executing a new written employment contract, most courts have held that the failure to have a written noncompete clause makes enforceability of the employment contract term based on the prior written agreement unenforceable. *See Sanz v. R.T. Aerospace Corp.*, 650 So. 2d 1057 (Fla. 3d Dist. Ct. App. 1995)(holding employee not bound by noncompete where contract was orally extended after three year term had expired); *Gray v. Prime Management Group, Inc.*, 912 So. 2d 711 (Fla. 4th Dist. Ct. App. 2005)(holding oral extension of employment contract did not apply to his non-compete agreement); *Zupnik v. All Florida Paper, Inc.*, 997 So. 2d 1234 (Fla. 3d Dist. Ct. App. 2008)(holding "post-termination restrictions expire upon the termination of [a contract] for a specific term, even if [the] employee remains an at-will employee after the [contract term ends].").

Another issue is whether particular interests of an employer may even be protected as a "legitimate business interest." For example, there is wide spread agreement in Florida courts that a general advertisement seeking new patients usually will not be considered a violation of a physician noncompete because it is not a solicitation aimed at specific current or prospective patients of the former employer.

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On the other hand, there is disagreement in Florida courts as to whether a former employee violates a noncompete by seeking patient referrals from “referring physicians.” Some courts have ruled that there is no violation in seeking referrals from the former employer’s “referring physicians”; while other Courts have ruled that there is a legitimate and enforceable business interest in protecting established relationships with “referring physicians.”

Another potential defense and issue involves consideration of public policy and the relationship between patients and physicians. Florida law specifically recognizes that restrictive covenants among lawyers will be narrowly construed to protect the “special trust and confidence” inherent in attorney-client relationships. Some legal commentators have called for a similar approach as to restrictive covenants involving physician-patient relationships. *See Infra Sanchez*. While courts in Florida have thus far rejected some broad based attacks on restrictive covenants for physicians as being “void and against public policy” other states have found that the physician-patient relationship is entitled to the same degree of protection as the lawyer-client relationship, and therefore noncompete clauses are narrowly construed with special consideration of possible negative impacts on the public.

All and all there are numerous defenses to enforceability of noncompete clauses. Whether you are the employer seeking to draft an enforceable noncompete agreement, or an employee about to enter into a contract with a noncompete clause, or even a party to a contract that has a noncompete clause, given the uncertainty and inconsistency of the courts in this rapidly evolving field of law, it is always best to seek advice of legal counsel on the specific issues as they relate to your contract. When consulting legal counsel about the noncompete clause make sure to ask about liquidated damages provisions and their enforceability and also about potential tortious interference of a contractual relationship claims and possible attorneys’ fees consequences to the non-prevailing party, as all of these issues are inextricably involved in every noncompete clause.

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